IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIREMAN'S FUND INSURANCE COMPANY, a corporation, *Appellant,* vs. THE GLOBE NAVIGATION COMPANY, a corporation, and S. P. WESTON, as trustee in bankruptcy of the Globe Navigation Company, a corporation, bankrupt, *Appellees.*	No. 2631.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR APPELLEES

H. R. CLISE,
C. K. POE,
W. H. BOGLE,
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THE IVY PRESS, THIRD AND CHERRY, SEATTLE

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BRIEF FOR APPELLEES

The appellant company, on April 17, 1911, issued two policies of marine insurance, insuring the Schooner "William Nottingham" in the total sum of $30,000.00 for the period of one year from April 20, 1911. The vessel was valued in the policies at $45,000.00. The vessel suffered a disaster in Octo-

ber, 1911, and this action was subsequently brought to recover the amount of the insurance as for total loss. The appellant company defended the action upon two grounds: First, that the vessel was unseaworthy at the commencement of the voyage in question, and therefore the policies were void; and, Second, that the loss was not total under the terms of the policies.

In this brief we treat the policy as governed by the *Civil Code of California,* because that Code is specifically referred to in clause 3 of the policy as furnishing the measure of liability under the policy, and also because the attestation clause recites that the policy is issued at San Francisco. The policy was actually delivered in Seattle, and the premium was there paid. If the Washington statute governs, the contentions we make are equally applicable, as the Washington statute defining abandonment and constructive total loss are substantially the same as the California statute.

Session Laws of Wash. 1911, p. 25.

I.

UNSEAWORTHINESS.

The policies were issued on April 17, 1911, for the period of one year from April 20, 1911. The vessel was engaged in the lumber trade and had been so employed by the Globe Navigation Company since her purchase by it in 1908. She returned from a voyage to Australia in September, 1911, and proceeded to Westport, Oregon, on the Columbia River above Astoria, where she loaded a full deck and under-deck cargo of lumber for Callao, Peru. Before proceeding to Westport for loading, however, the vessel was surveyed at Astoria, Oregon, by Captain Crowe, who is admitted to have been a surveyor for the appellant company at that time. (His survey report is Plaintiff's Exhibit "M" in the record.)

After the vessel was fully loaded at Westport, she started on her voyage and grounded at the entrance of the slough to Westport. She went aground at high tide and remained aground until high tide of the next day, when she was pulled off by the assistance of two tugs. She then proceeded on her voyage down the river to Astoria, where another survey was had; and this survey was made by one Mr. Cherry, at the request of Captain Crowe, who,

for some reason, was unable to attend in person. (The survey report was signed by Cherry in the name of Captain Crowe, and is marked Plaintiff's Exhibit "N" in the record.) After this survey the vessel proceeded to sea on October 2nd, and crossed the Columbia River bar without any unusual incident. After crossing the bar and getting on his course, the master caused the mate to sound the pumps, and he found about fifteen inches of water in the hold of the ship, which was pumped out by the hand pump of the vessel. After two days at sea, on or about October 4th, when the wind had freshened to about thirty-five miles an hour, the wind shifted to the southwest and increased in velocity, and the master thereupon placed the vessel on the starboard tack. In doing so, the sea being rough and the vessel having a very heavy deck cargo, she took a heavy lurch to port, and the deck load shifted several inches. Immediately the vessel began to take water through the break of the poop and in the storeroom under the break of the poop (Apostles, p. 262). The master found immediately afterward that the galley was flooded with water as the result of the shifting of the deck load, and it filled to such an extent that the cook was driven out. This water came through the quick-work of the vessel. The master, finding that the hand pumps

were not able to keep down the water which the vessel was taking at the points above mentioned, as a result of damage from the shifting of its deck cargo, ordered the mate to start the steam pump (Apostles, pp. 263-4-5). This steam pump had been inspected by the surveyors on both of the surveys above referred to, and had been worked by them and found to be in perfect condition. At the time of the surveys, however, there was no water in the bilges of the vessel and consequently the steam pump was not attached to the hose extending to the vessel's bilges, but was attached to a hose running over the side of the deck and used in pumping water and washing the decks (Apostles, p. 312). When the mate started the steam pump it was found that something happened to be wrong and it would not work. The master states that there was some delay in getting the pump started, but he did not know just what the trouble really was. He states that there was no mechanical defect or broken part of the pump, and that its failure to work immediately was probably caused by a piece of wood or bark or something similar getting into the valves or clappers and stopping it up (Apostles, pp. 265-6).

At the time this testimony was taken, on August 30, 1913, the defense of unseaworthiness had not

been made in the pleadings, but on the contrary, the issues, as they then stood under the pleadings, admitted the liability of the appellant on the policies, but denied that there was a total loss. For this reason the facts with respect to the temporary obstruction of the steam pump were not developed in detail. It was mentioned merely as an incident. The steam pump, however, was gotten into good working condition by the crew and put to work in a very short time. The master (Apostles, p. 269) states that his recollection was that this was on the 6th, although he is not quite clear as to the exact date.

On October 8th a very heavy gale suddenly came up from the northwest, the wind blowing at the rate of about 100 miles an hour, which did considerable additional damage to the vessel, causing another shifting of the deck load and tearing loose some of her boats, hanging in the davits (Apostles, p. 270). The shifting of the deck load also carried away three masts and a large part of the deck load went over the side, threatening to swamp the ship. After considerable difficulty, the crew succeeded in cutting loose this wreckage and the pumps were again started. They had succeeded in almost freeing the vessel of water by the use of

the pumps when she was struck by another heavy gale from the southeast, and the vessel filled in a very short time. This was on October 11th. The vessel was in immediate danger of sinking and was abandoned by the master and crew, who were taken off by the Schooner "David Evans." It was admitted by proctors for the appellant that the crew was justified in abandoning the vessel at that time (Apostles, p. 283). The crew was landed at Astoria on Saturday, October 14th, and the master immediately caused notice to be given to its owners, by long-distance telephone, of the loss of the vessel.

The tug "Wallula" subsequently found and picked up the wreck and brought her into Astoria, reaching there about noon, October 15th. The owner, master and crew of the salving vessel "Wallula" retained possession of the vessel, making a claim for some $34,000.00 against the vessel and cargo for salvage. The vessel was abandoned by the owner to the underwriter either on October 14th or October 16th. The appellee claims that a verbal abandonment was made on October 14th, but this is disputed by the appellant. A written abandonment was made on October 16th. There were no facilities at Astoria for repairing the vessel, nor could she be discharged, surveyed or examined at that place. After abandonment by the owner it was agreed by

the underwriter and owner that the owner should arrange to have the vessel taken up the Columbia River to St. Johns, near Portland, where she could be discharged and surveyed. The salvors would not surrender possession nor take the boat to St. Johns nor assume the expense nor the risk of the towage from Astoria to St. Johns. The owner, therefore, at the instance of the underwriter, applied to the United States Circuit Court at Portland, and obtained an order from that court in salvage proceedings permitting the towing of the vessel from Astoria to St. Johns, and the discharge of the cargo, upon condition that the expense thereof be paid by the owner as against the salvors, and that the owner would execute an indemnity bond to protect the salvors against the risks of the voyage. The bond was given by the appellee, and the vessel was thereupon towed to St. Johns, the cargo discharged, the vessel put in drydock and surveyed. Subsequently, representatives of the owner arranged a settlement with the salvors for a consideration of $3,000.00. Thereupon, Johnson & Higgins, insurance adjusters, made a statement of the expenses incurred subsequent to the written abandonment of October 16th, by the owner, apportioning the expenses that were for the joint benefit of vessel and cargo between those interests, and charging to the

owner the expenses that were for the benefit of the vessel alone. The joint expenses of vessel and cargo, including the $3,000.00 salvage award, amounted to $8,780.00. The additional expenses charged to the owner alone, as found by the adjusters, amounted to $3,244.58. The underwriter subsequently paid the owner, through the adjusters, two-thirds of the vessel's proportion of the joint expenses of vessel and cargo, as found by the adjusters.

Suit was brought on the policies on May 13, 1912, at Seattle, claiming a total loss. Appellant answered June 13, 1912, denying that the damages to the vessel amounted to total loss either actual or constructive, under the policies, but admitting its liability under the policies for its proportion of general average and salvage charges accruing from the preservation of the vessel and cargo. The average adjustment had not been completed at that time, so that the appellant was not able to and did not tender the amount for which it admitted liability under the policies. Subsequently, upon the completion of the average adjustment, as stated above, it did pay this proportion as a liability under the policies. On March 31, 1914, appellant filed an amended answer, setting up, for the first time, unseaworthiness as a defense to this action (Apostles,

p. 143). The unseaworthiness alleged in the answer consisted

> "in that she was leaky and her pumps were not in working order so that the same could be used to keep said vessel free from water which entered her hull through said leaky condition, and that by reason thereof said vessel commenced to leak and became water-logged in fair weather immediately after starting upon said voyage. That all losses and damages suffered by said vessel upon said voyage were caused and occasioned by the aforesaid unseaworthiness of said vessel."

No offer to rescind nor to return the unearned portion of the premium has ever been made nor pleaded by the insurer.

(1) Defense of Unseaworthiness Waived.

The defense of unseaworthiness, put forth in the amended answer, had been waived. The vessel was brought into Astoria by the salvors on October 15, 1911, and was abandoned to the underwriter, verbally, on October 14th, and in writing on October 16th. The underwriter declined to accept abandonment, but admitted liability in the event a total loss within the terms of the policy was shown, and, in any event, admitted liability under the policy for any salvage or general average expenses that had been or might be incurred.

Negotiations between the owner and under-

writer began immediately after abandonment and continued until suit was brought in May, 1912. The underwriter, admitting its liability under the policy for some amount, and admitting its liability for the full amount in the event a total loss was shown, agreed with and induced the owner to incur the expenses shown in the average adjustment of Johnson & Higgins, by securing a transfer of the vessel from Astoria to St. Johns, and a discharge of the cargo and drydocking and survey of the vessel, and also the expenses of securing a restoration of possession of the vessel by the salvors to the owner and of disentangling her from the liens asserted by the salvors. In these operations, approved and instigated by the underwriter, the owner expended $8,780.00 for the joint benefit of the vessel and cargo, and $3,244.00 additional for the benefit of the vessel alone, as shown by the Johnson & Higgins adjustment. The underwriter not only had knowledge of and approved in advance these expenditures on the part of the owner, but in its pleadings when the action was brought, specifically admitted its liability on the policy and thereafter paid, through the adjusters, a portion of these expenses under its policy liability.

It is a settled principle of law that

"Any forfeiture of a policy caused by a violation of its terms will be deemed waived by the insurer if, after knowledge of the facts constituting such forfeiture, he treats the policy as obligatory."

Barber, Principles of Insurance, p. 96.

"When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture; but it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy or does acts based thereon, or requires the insured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture is as a matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel."

Titus vs. Glen Falls Ins. Co., 81 N. Y. 419.

When the insurer, conceding its liability under the policy for some amount, induced the owner to

incur the expenses which are shown to have been incurred subsequent to October 16, 1911, it thereby waived any right to claim that the policy had been forfeited by starting on a voyage in an unseaworthy condition unless it is shown that the insurer did not have knowledge of the facts which it now claims constituted unseaworthiness.

The appellant, in its brief, contends that the vessel must be presumed to have been unseaworthy at the commencement of the voyage, because, as it claims, the vessel sprang a leak within a few days after sailing, under weather conditions which would not ordinarily cause such a leak, the leak being so great that the hand pump could not handle the water and the steam pump being found unworkable when needed. We do not dispute the legal proposition laid down in cases cited on page 12 of appellant's brief.

It is manifest, however, that the appellant was substantially as well informed as to the conditions developed by the testimony at the time it induced appellee to incur these expenses and at the time it paid a proportion thereof to the appellee, as it was at the time it filed its amended answer herein. The report of protest made by the master in October, 1911 (contained in Res. Exhibit 4); and the

statement of the incidents of the voyage as contained in the average adjuster's report, and in the survey report of Walker and Crowe (Plaintiff's Exhibit "M"), are substantially the same as were set forth in the testimony in the case. The only testimony in the record tending to show unseaworthiness at the beginning of the voyage, aside from the argument based upon the alleged defect in the steam pump, was that of Captain S. B. Gibbs, who stated that there was an open seam on the port side of the vessel below the load line where the oakum was found to be missing in the seam and which opening was of such size at the time he examined it in May, 1912, as to have admitted a considerable quantity of water into the bilges of the ship. He does not, of course, testify that this defect existed at the time the vessel commenced her voyage at Westport, but does express a tentative or qualified opinion that it probably was or might have been caused by the failure to caulk this seam at the time the vessel was last recaulked in 1907 (Apostles, p. 428). He also found a small crack in the lead flange of the water closet which he thinks might have admitted some water, although it is apparent from his testimony that the amount would be very small. The appellant has introduced into the record a copy of a night letter which it claims was

received by it from Captain Crowe, its marine surveyor, under date of December 21, 1911, which specifically calls attention to this open seam referred to by Captain Gibbs (Apostles, pp. 440-1). If the contention of the appellant that the vessel was unseaworthy is based upon leaks from the existence of this open seam, then appellant had full notice thereof at least as early as December 21, 1911. If this is not the defect relied upon as creating the leaky condition, then the record is absolutely devoid of any evidence tending to show the cause of the leak except the damages occurring after the voyage commenced, to-wit: The stranding at the mouth of the slough near Westport, the heavy lurch of the ship and the shifting of the heavy deck cargo on October 4th and other sea damages thereafter, as testified to by the master. If the leaks were caused by these occurrences they do not tend to show unseaworthiness at the commencement of the voyage at Westport. At any rate, the appellant knew, at least as early as the latter part of October or early in November, 1911, that the vessel had suffered this disaster a few days after going to sea, and it knew the incidents of the voyage from the protest of the master and the statement to the average adjusters contained in their report, and if it intended to rely upon unseaworthiness as a defense, it should have

made its decision to that effect at that time, before inducing the appellees to incur the expenses we have referred to.

With respect to the failure of the steam pump to work immediately, that fact was known to appellant at least as early as December 21, 1911. In the report of the survey by Crowe and Walker, representing the underwriter and the owner (Plaintiff's Exhibit "M"), it is recited that on October 6th "an attempt was made to start the steam pump, which, however, failed to work." (See Apostles, p. 259.)

(2) Vessel Was in Fact Seaworthy.

As stated above, the only defects claimed in the vessel, so far as shown by the evidence, consisted of this alleged open seam and the crack in the water closet flange. Captain Gibbs, the expert surveyor representing the respondent, stated that this seam at the time he examined the vessel, in May, 1912, was approximately six inches long and one-sixteenth of an inch in width. It will be noticed that he carefully avoided stating, or even expressing an opinion, that an amount of water could enter the vessel through this open seam in excess of the capacity of the ordinary ship's hand pumps to handle. The

most that can be gathered from his testimony is that, under sufficient pressure, it might be possible for the vessel to receive enough water through this open seam and through the crack in the toilet flange to keep the pumps fairly busy.

We have no disposition to criticize the testimony of any of the witnesses in this case, but we feel that it is only fair to say that Captain Gibbs' testimony, particularly on cross-examination, shows a partisanship and a reluctance to admit any fact favorable to the appellees, for which allowance must be made in considering the weight to be given to his opinions. He would not state that the oakum from this seam was missing prior to the commencement of this voyage, but did finally, when pressed, express the opinion that the seam was probably overlooked when the vessel was last caulked (Apostles, p. 428).

The testimony shows that the vessel was last caulked in 1907, in Boston (Apostles, p. 238). She had been engaged in the lumber trade continuously from 1908 down to the happening of this accident in October, 1911. Immediately before the loading for this voyage she had just returned from a voyage to Australia, carrying lumber. She had never, at any time during those three years, experienced any

trouble whatever from water in her hold. (See Swenson's testimony, pp. 285-6, p. 325.) It is obvious, therefore, either that this open seam did not exist prior to the end of her last voyage preceding this one, or that it was not such an opening as would admit sufficient water to endanger the ship. According to Captain Gibbs' testimony, this seam was located below the load line. Manifestly, during the three years preceding, on all of the voyages the vessel had made, this seam was under water and the vessel had at various times successfully encountered severe storms, and, according to the testimony of the master, had never taken in any quantity of water beyond the normal for such vessels.

Mr. Walker testified that when he examined the vessel, in the fall of 1911, after the accident, there was a small place in this seam where the oakum was missing, but it was not nearly so large as it was in May, 1912, when examined by Captain Gibbs, and that, in his opinion, the quantity of water which could enter the vessel through this open seam was not sufficient to cause any trouble whatever (Apostles, pp. 354-5).

Even if the existence of this open seam would have constituted unseaworthiness, there is no reason whatever to conclude that such was its condition

at the beginning of this voyage. As stated above, the vessel had just returned from a long voyage, on which she had carried a full-deck and under-deck lumber cargo and had not taken in any unusual amount of water.

The current voyage commenced at Westport, on the Columbia River, on September 26, 1911. The testimony shows that when the vessel was proceeding to Westport to receive her cargo, she was examined by Captain Crowe, on behalf of the underwriters, at Astoria, and received the usual certificate of seaworthiness from him (Plaintiff's Exhibit "M"). She then proceeded to Westport and loaded her cargo and started on her voyage from Westport. If she was seaworthy at the time she loaded cargo at Westport and started on her voyage, then the implied warranty is satisfied. After leaving Westport, the vessel stranded at the mouth of the slough on the Columbia River, at high tide, and remained aground until high tide of the next day, when she was pulled off by two tugs. She then proceeded down the river to Astoria, where she was again examined and surveyed by a representative of Captain Crowe's office, and the usual certificate of seaworthiness was issued by him in Captain Crowe's name. (This certificate is Plaintiff's Exhibit "N.")

It is claimed by appellant, in its brief, that this examination was not made by Captain Crowe, but by Mr. Cherry, who was in fact a Lloyd's surveyor. It is a fact, however, that Mr. Cherry acted ostensibly at the request of Captain Crowe and as his representative. However, whether the inspection was made by Captain Crowe or a Lloyds surveyor is immaterial. The vessel was found to be seaworthy. Of course, as the vessel was fully loaded, it was impracticable to examine her hull below the load line. After this inspection, the vessel proceeded on her voyage. The incidents thereafter are given by Captain Swenson.

The steam pump was used at Astoria in washing down the sides of the vessel, and worked perfectly. It was not used on the bilges for the reason that there was no water in the bilges. The pump, however, was examined and tested by Captain Crowe at the time he made the survey (Plaintiff's Exhibit "M"). (See Swenson's Testimony, Apostles pp. 325-6.)

The vessel left Astoria, outward bound, October 2nd. Two days later the master found she was taking slightly more water than normal. This was October 4th. It required the use of the hand pump about one hour in four to keep the water down. The

wind was then blowing about thirty-five miles an hour (Swenson's Test., Apostles, p. 262). The wind then shifted to the southwest and increased in velocity and the sea became fairly rough. The master put the vessel on the starboard tack, and, as he did so, owing to the condition of the sea, the vessel gave a lurch to port and shifted the deck cargo some three or four inches. Soon thereafter the master discovered that water was coming into the vessel in considerable quantities in the storeroom under the break of the poop. He also found water coming in freely forward, flooding the galley. This increased flow of water is stated by the master to have been caused by the shifting of his deckload, parting some of the seams (Apostles, pp. 262-3). The water also came in through the quickwork in such quantity as to drive the cook out. By that time the sea had become very rough, and finding difficulty in handling the water with the hand pumps, the master instructed the use of the steam pump. Some difficulty and delay occurred in getting the steam pump to work, owing, as the master states, to some piece of wood or other substance getting into the suction pipes, or something clogging the valves. The steam pump was finally straightened out and put to work October 6th. They found no mechanical trouble or broken parts about

the pump (Apostles, p. 266). The weather continued rough, with a strong wind from the southwest, until about noon, or a little later, on the 8th. By that time the steam pump had reduced the water two-thirds or more, and the master states that he would very shortly have had the vessel free of water. About noon of the 8th, however, a terrific gale came up from the northwest, the wind blowing about 100 miles per hour, and tore the ship's boats from the davits and threw the ship on her beam end. Her deck cargo shifted badly and was lost overboard, carrying the ship's masts and sails, and completely disabling her. The further incidents thereafter are detailed in full by Captain Swenson (Apostles, pp. 268-271). He and the crew stayed by the vessel throughout the 9th, 10th and 11th, when the crew refused to stay aboard longer and were taken off by the "David Evans" and the vessel left adrift.

The contention of appellant's attorneys is that nothing occurred between the time the vessel started on her voyage at Westport until she was waterlogged and dismasted that would account for the disaster to the vessel, and, therefore, argue that it must be presumed to have resulted from unseaworthiness at Westport when she loaded. We think

the mere statement of the incidents of the voyage as detailed by Captain Swenson is a complete answer to that contention. Before the vessel had gotten fairly started she went aground on the bar of the Columbia River, where she remained from high tide one day to high tide of the next day and was pulled off by the aid of two tugs. At that time she was heavily loaded and had a deck cargo of heavy timbers extending some nine or ten feet above the rail. It is perfectly manifest that the whole structure of the vessel was exposed to a tremendous strain during the time she was aground, and particularly at low tide, when the hull of the vessel was deprived of support. Even at high tide she was unable to float; and the pull given by the two tugs in relieving her exposed the structure of the vessel to an additional severe strain, carrying as she was an exceedingly heavy deck cargo. No trouble of any consequence from the inflow of water occurred until after the vessel struck fairly rough water and her deck cargo shifted. This shifting of the cargo, as stated by the master, was caused by the rough seas, and was immediately followed by an inflow of water under the break of the poop and into the storeroom, and also forward through the quickwork into the galley. This water evidently did not come from the open seam spoken of by Captain

Gibbs, because he states that any water entering through that seam would go down into the bilge.

Referring again to this alleged open seam and the testimony of Captain Gibbs respecting it, we call attention to the testimony of Captain Swenson (on page 288, Apostles) and Mr. Walker (on pages 352 to 357 of Apostles), relative to the construction of the ship, with which Mr. Walker was familiar, having been the owners' surveyor at the time she was built at Ballard. It is evident from this testimony that no considerable quantity of water could by any possibility have entered the ship from that source. It is also evident that, between the time this seam was examined by Captain Crowe and Mr. Walker on December 21st, and the time it was examined by Captain Gibbs, in May following, most of the oakum had worked out, or had been taken out of this seam.

It is also contended by appellant that, because the steam pump failed to work immediately when tried on October 4th, the presumption arises that it was in a defective condition at the commencement of the voyage, and that, if so, the vessel was unseaworthy. We contend, in the first place, that, even if the steam pump was in a defective condition at

the commencement of the voyage, this did not render the vessel unseaworthy.

The *California Civil Code,* Section 2682, defines "seaworthy" as follows:

> "A ship is seaworthy when reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties to the policy."

This vessel was equipped with the usual hand pumps, which were sufficient to handle the water ordinarily taken in by the vessel in such storms as she usually encountered on her voyages. The testimony shows that the steam pump had not been used in clearing the vessel of water since she was in port at Callao. This fact proves that the hand pumps were amply sufficient to enable the vessel to encounter the ordinary perils of the sea. She was a lumber carrier, and was not, therefore, required to be kept absolutely water-tight. The disaster in this case was due, not to the insufficiency of the pumps, but to the extraordinary force of the sudden gales and squalls encountered on this voyage. It was in no sense attributable to any failure of the pumps. The shifting of the cargo on October 4th, and the dismasting of the vessel on the 8th were the effects of the extraordinary heavy wind and sea. There is no reason to doubt that the same effect

would have resulted if the steam pump had been in perfect working condition. If, as we think the testimony shows, the hand pumps were sufficient to handle the water taken in by the ship and to enable her to encounter the ordinary perils of her contemplated voyages, then a defective condition of the steam pump, even if proved to have existed at the commencement of the voyage, did not constitute unseaworthiness.

We insist, however, that the testimony does not justify the inference that the steam pump was defective at the commencement of the voyage. It was tested by appellant's surveyors, both before and after the loading for this voyage. It was not attached to the hose leading to the bilges of the ship in these tests because there was no water in the bilges at that time, but the pump itself was operated to the satisfaction of the surveyors, lifting water from the side of the ship and working perfectly. The master states that the trouble with the pumps on October 4th was caused by some piece of wood, bark or other substance getting into the valves of the hose and temporarily clogging it. This inference is fair and reasonable under all the facts. When the pump was put in condition by the crew, it was found that there was no break in any of its parts and no mechanical defects, the trouble result-

ing from clogging at some point. The trouble was accidental and temporary and such as is liable to happen at any time to lumber carriers. Such occasional and temporary troubles or defects do not constitute unseaworthiness.

The Mexican Prince, 82 Fed. 484.

The burden of proving that the vessel was unseaworthy rested upon the Insurance Company (appellant) which relies upon it as a defense. The presumption of law being that a vessel is seaworthy until the contrary is proven.

Thames & Mersey Marine Ins. Co. vs. Pacific Creosoting Company, 223 Fed. 561 (decided by this court on May 10, 1915).

Gow on Marine Insurance, p. 273.

Nome Beach Lighterage etc. Co. vs. Munich Assur. Co., 123 Fed. 820, 827 and cases there cited.

We confidently assert that this burden has not been sustained by the appellant.

(3) Even If There Was a Breach of the Implied Waranty of Seaworthiness, Does It Annul the Policy?

Undoubtedly, at common law, such would be the effect. But this policy is governed by the provisions of the California Civil Code. Section 2610 provides that:

> "The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other party to rescind."

Section 2611 provides that:

> "A policy may declare that a violation of special provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid it."

In *Victoria S. S. Co. vs. Western Assur. Co.,* 139 Pac. 807, the Supreme Court of California held that this statute changed the common law, and that a breach of either an express or implied warranty did not avoid the policy, but, if it was "material", it gave the other party a right to rescind. The wreck in this case was caused by sea perils, and not by a defective pump. It would have occurred if the pump had been in working order at all times. The warranty to have pumps in working order at the commencement of the voyage was therefore im-

material, as the loss did not result from a breach of that warranty.

If, however, it was material, the insurer had the right, under Section 2610, to "rescind", but the policy was not avoided otherwise if it did not rescind. On the contrary, after knowledge of the failure of the steam pump to work when first tried—which knowledge it had from the surveyor's report of December 21, 1911, and also from the other documents previously referred to—it took no action toward rescision, and has not rescinded to this day. A rescision, of course, required a return of the unearned premium, which has never been tendered. In fact, the answer of appellee did not set up a rescision; it alleged merely a breach of warranty, without any action by the appellant offering to rescind. Inasmuch as the decision in the *Victoria S. S. Co.* case was a construction of a state statute by the Supreme Court of that State, it is, of course, binding upon this court.

Elmendorf vs. Taylor, 10 Wheat 154 (6 L. Ed. 288 and note).

With respect to the defense of unseaworthiness, we respectfully submit: First, that the defense was waived by the appellant; second, that the vessel was fitted for encountering ordinary perils contemplated

by the voyage, with her hand pumps; third, that the evidence does not justify the conclusion that the steam pump was defective at the commencement of the voyage; and, fourth, that the appellant has never rescinded on account of the alleged breach.

II.

CONSTRUCTION OF POLICY.

It is now settled by the authorities that, inasmuch as these printed policies were gotten up by the insurance companies themselves, all doubtful, ambiguous clauses are construed most strongly against the insurance company and most favorably to the insured. Where two provisions in the policy are contradictory or inconsistent, the provision most favorable to the assured will be given effect. Where any part of the contract of insurance is in writing, it will supersede any printed provisions inconsistent therewith; any special riders or marginal clauses written on the policy are given effect as against any inconsistent provision in the printed form, and are assumed to have been intended to amplify, extend or restrict the printed form.

London Assurance vs. Companhia, 167 U. S. 149.

Thames & Mersey vs. Pacific Creo. Co., 223 Fed. 561.

Devitt vs. Prov. Wash. Ins. Co., 165 N. E. 777.

Victoria S. S. Co. vs. W. A. Co., 139 Pac. 807.

Western Ins. Co. vs. Cropper, 32 Pa. St. 351.

Risley vs. Ins. Co., 189 Fed. 529.

Canton Insurance Office vs. Woodside, 90 Fed. 301.

National Bank vs. Insurance Company, 95 U. S. 673.

As was said by Mr. Justice Harlan in the latter case:

> "The Company cannot complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the Company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

Let us apply these settled rules of construction to the policy in question. The section of the clause of the policy numbered "3d" reads as follows:

> "Touching the adventures and perils which this Insurance Company is contented to bear, and takes upon itself in this Policy, they are of the Seas, Fires, Pirates, Assailing Thieves, Jettisons, Barratry of the Mariners (but not of the Master) * * * and all other losses and misfortunes that shall come to the hurt or

> damage of the vessel hereby insured, or any part thereof, to which insurers are liable by the Rules and Customs of Insurance in San Francisco, including the Rules for Adjustment of losses printed on back hereof and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this Policy."

Clearly, this means that all losses and misfortunes for which insurers are liable by the provisions of the *Civil Code of California* are intended to be covered by this policy, except such particular losses and misfortunes as are expressly excluded by the terms of the policy itself. Partial losses are expressly excluded. Total loss, however, whether actual or constructive, is expressly included. It is not only included in the printed portion of the policy, but also in the added marginal clause. If there is any ambiguity in this policy considered as a whole, the construction most favorable to the assured must prevail.

The *Civil Code of California* defines a constructive total loss as one which gives the person insured a right to abandon, and Section 2717 provides as follows:

> "A person insured by a contract of marine insurance may abandon the thing insured or any particular portion thereof separately valued by the policy, or otherwise separately

> insured, and recover for a total loss thereof when the cause of the loss is a peril insured against: (1) If more than one-half thereof in value is actually lost or would have to be expended to recover it from the peril; (2) If it is injured to such an extent as to reduce its value more than one-half; (3) If the thing insured, being a ship, the contemplated voyage cannot be lawfully performed without incurring an expense to the insured of more than half the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances."

Where constructive total loss is not excluded from the policy, then by clause 3 of this policy, the underwriter is liable for a constructive total loss such as is described and defined by the *California Code.* Aside from the marginal clause in this policy, there is a serious question whether Clause 3 of the policy is not in conflict with the 9th clause. It seems to us that there is a conflict between the two. By Clause 3, all sea losses for which an underwriter would be liable under the *Code of California,* are assumed by the insurer, except only losses expressly excluded by some other provision of the policy. Clause 9 does not undertake to exclude constructive total loss as a risk under the policy. The underwriter can exclude from the policy any losses or misfortunes whatever by so stating in the policy; but where by the policy he undertakes a stated risk, then, under Clause 3 of the policy, his liability is to

be determined by the provisions of the *Civil Code of California.* The effect of the reference to this Code in Clause 3 is to incorporate in the policy all of the provisions of that Code relating to the risks covered by the policy. Constructive total loss is a risk specifically covered. If the sections of the Civil Code defining a constructive total loss and defining the right to abandon had been set out in full in Clause 3 of the policy, instead of being incorporated merely by reference to the provisions of the Code, the inconsistency between Clause 3 and Clause 9 would be apparent. If these clauses are inconsistent, then the clause most favorable to the assured must be given effect.

So far as is shown in the reported cases, none of the cases cited by the appellant on page 37 of its brief contained any clause in the policy itself referring to a statute as defining the extent and nature of the liability for the losses covered by the policy. We do not deny the right of parties to contract with respect to marine insurance and to incorporate any legal conditions in the policy, as fully as in any other kind of contract; but clauses restricting liability where the liability would otherwise exist under the law must be free from ambiguity and consistent.

But the question in this case does not necessarily depend upon whether there is a conflict between Clause 3 and Clause 9, or whether there would be such ambiguity or uncertainty in these two printed clauses as to call into effect the rule of construction above mentioned.

The first printed clause in the policy expressly covers actual and constructive total loss, and expressly excludes partial loss or particular average. The vessel is valued at $45,000. The uncontradicted testimony is that the vessel was worth only $30,000, and that fact was known to both owner and underwriter at the time the policy issued. The valuation of $45,000 was expressed in the policy at the dictation of the underwriter (Thorndyke's Testimony, Apostles pp. 337 and 338). Under those circumstances, and with these conceded facts, it became, of course, obvious to any intelligent owner that, although he was paying a premium for protection against a constructive total loss, he would not get such protection under the printed form of policy tendered, with the valuation insisted upon by the underwriter. In Clause 9, deducting one-third new for old from repairs, and one-third uninsured, it would require a damage to the vessel amounting to $33,750 in order to con-

stitute a constructive total loss. When it is conceded that the vessel was worth only $30,000, it is, of course, obvious that she could not possibly sustain a damage amounting to $33,750. Under these circumstances, we find written on the margin of the policy this clause:

> "This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under three-fourths (¾) running down clause."

Appellant in its brief admits that total loss, both actual and constructive, salvage, general average and three-fourths of collision damages, were each and all covered by the printed body of the policy (Appellant's Brief, pp. 22-29).

That being true, why was the marginal rider added? Appellant says it was merely definitive—a restatement on the margin of the same risks stated in the printed policy, without addition, modification or qualification of those risks or of the conditions attached to them by the printed form. This construction gives no force whatever to the marginal clause and, in effect, eliminates it from the contract.

Manifestly, this endorsement was made for some purpose. It must be assumed to have been intended to amplify, extend or restrict the printed policy. It is ambiguous; but that ambiguity is the

fault of the underwriter. In clause 9 it is provided that a vessel shall not be abandoned unless the company would be liable to pay under an adjustment for partial loss for labor and materials "*exclusive of salvage or general average expense* and the cost of funds", etc. That evidently intends that, in a computation to determine a constructive total loss, salvage and general average expense shall be *excluded.* The marginal clause states that the insurance is against total or constructive total loss "*including general average and salvage charges* and the three-fourths running-down clause". This marginal clause may be construed as intending the insurance to cover actual and constructive total loss, *including* salvage and general average expenses in the computation, as contra-distinguished from the provision in clause 9 of that salvage and general average expenses shall be *excluded* from such computation. It is true that the same marginal clause includes liability under the three-fourths running down clause.

We recognize the difficulty in giving this construction to the written marginal clause suggested by appellant in its brief, that is, that it would apparently include claims under the three-fourths running-down clause in the computation of con-

structive total loss, and it is not usual to include those claims in determining constructive total loss. But appellant is itself responsible for the wording of the clause, and it cannot complain if effect is given to the words it has used. The word *"including"* which connects the total loss of the vessel and the general average and salvage charges, does not ordinarily suggest that the latter are separate risks. If it had been intended to state salvage and general average as separate risks in addition to total loss, the word *"and"* would have been used to connect them, instead of the word *"including"*.

The marginal clause is also capable of the construction that the insurance was against total or constructive total loss as defined in the *California Code* and the General Marine Insurance law, and was also intended to cover general average, salvage, etc. If the total and constructive total loss stated in the margin is the same loss covered by the printed policy, it was useless and senseless to repeat it on the margin.

Keeping in mind that the underwriter had exacted a valuation in the policy of $45,000 on a vessel then known to be worth only $30,000, and that, under Clause 9 of the policy, constructive total loss was an impossibility under the policy as it then

stood, it seems reasonable to assume that the marginal clause was added in order to give the owner the protection which he was paying for with his premium, that is, substantial protection against total or constructive total loss of this particular vessel under the facts known to both parties. It is a fair inference that the owner was not willing to accept the printed policy for the reason that it afforded no real protection against constructive total loss, and he insisted upon a marginal clause that would give him substantial protection; and it is not altogether beyond belief that the underwriter at that time, in view of the known over-valuation of the vessel in the policy, designed this marginal clause to afford real protection to its customer. Under that construction, the valuation in the policy would affect merely the proportion of salvage, general average and sue and labor expenditures for which the insurer would be liable.

We do not charge that the printed form of policy, under ordinary circumstances, operates as a fraud. Clause 9 undoubtedly imposes harsh restrictions upon the assured, in that it requires a loss of 75 per cent of the policy value in order to constitute a constructive total loss, as against 50 per cent of actual value, in ordinary policies. But it is entirely legitimate for the underwriter and owner to

contract, and if they do enter into a contract requiring a 75 per cent damage to constitute a constructive total loss, both parties understanding the contract, and there being no other clauses inconsistent therewith, there is no fraud involved. But if the underwriter inserts and insists upon a valuation known to be largely in excess of the actual value, so that 75 per cent of that amount is in excess of the known value of the vessel, and induces the owner to accept such a policy under the belief that he is securing protection against the risk of a constructive total loss, we think it is a palpable fraud; and we are willing to believe that the underwriter in this instance was not willing, and did not intend, to perpetrate a fraud, and, therefore, made this written marginal clause covering constructive total loss as known in General Marine Insurance, in order to afford the real protection it was pretending to give.

Risley vs. Ins. Co., 189 Fed. 529.
Leeds vs. Ins. Co., 8 N. Y. 351.
Harper vs. Ins. Co., 17 N. Y. 194.
Harper vs. Ins. Co., 22 N. Y. 441.

III.

ACTUAL TOTAL LOSS.

The testimony of both Thorndyke and Walker is to the effect that the wreck, as it lay in Astoria, on October 16th, was absolutely worthless as a vessel, and had no value except for the junk value of its material (Apostles 181-2, p. 194). This testimony is not contradicted by any other witness. It is confirmed by the fact that, after an expenditure of $5,780, as shown by the statement of Johnson and Higgins, after deducting the salvage award, and the expenditure of the other sums noted by them but charged in their statement to the owner, the vessel free of all these claims was considered by the parties to be worth only $5,000. The stipulation, found on page 386 of the Apostles, fixes the value of the vessel, on April 15, 1912, at $5,000. This was after the payment of the salvage award, and was considered the value of the vessel free and clear of all claims (Apostles, p. 386).

Manifestly, the wreck had no value as a vessel at Astoria, on October 16th, if, after an expenditure of some $7,000 was thereafter made in removing her to St. Johns, clearing her of her cargo, and entanglements, she had a value of only $5,000. It also appears from the testimony of both Thorndyke and

Walker, which is uncontradicted, that the value of the vessel, after being repaired, would not have exceeded $24,000 to $25,000 (Apostles, pp. 182 and 194-5). No other valuation is given by any other witness. The Cornfoot bid, which was the lowest tendered, was $20,950. There had been expended prior thereto, in order to place the vessel in a position where repairs were possible, the sums found by Johnson & Higgins, which, added to the Cornfoot bid, exceeds the repaired value of the vessel.

These facts show an absolute total loss of the vessel, if, as we contend, a damage so great as to destroy all value of the vessel as a vessel, so that it would cost more to put her in a condition for use as a vessel than she would be worth after repairs, is the correct rule of law. We realize that there is a conflict in the authorities upon this question. Of course, in such a conflict, any decision of the Supreme Court is controlling.

We think that this question is settled by the case of

Insurance Co. vs. Fogarty, 19 Wallace, 640. It is there distinctly held, after a review of the cases, that it is not necessary to a total loss that there should be an absolute extinction or destruction

of the thing insured. If the damage is such that the thing insured has no value for the use for which it was intended, and cannot be so repaired as to make it useful for that purpose, except at an expense exceeding its value, it is a total loss under the Marine Insurance Law.

In that case, pieces or parts of a machine, so made and shaped as to unite with other pieces, thereby making a complete machine, were insured for the voyage. The policy was against absolute total loss only. Some of these pieces of machinery were lost and the pieces that were saved were rusted and otherwise damaged and could not be repaired so as to make it practicable to use them for the purpose intended, except at an expenditure greater than their value. The Supreme Court held that this constituted an absolute total loss under the policy, although half in quantity of the thing shipped remained in specie, although damaged.

We deem it unnecessary to cite the various cases upon both sides of this question, for the reason that we consider this decision of the Supreme Court as settling the rule in the federal courts, but such authorities are found in 26 *Cyc.* 692.

There is no provision in this policy which changes the general rules of marine insurance relative to absolute total loss.

IV.

ABANDONMENT.

(1) Mr. Thorndyke testified that he abandoned this vessel to the underwriters, verbally, on Saturday, October 14th, and followed this up by written abandonment, on the 16th. Mr. Taylor contradicts this testimony as to the verbal abandonment on the 14th. This raises a pure question of fact. Taylor produced his diary, the entries in which indicated that he was in Tacoma during the afternoon of the 14th, and that he received notice at his residence in Seattle by telephone from some source of the loss of the "Nottingham" during the evening of the 14th. He has no recollection of the source from which he received the information, but his guess was that it came from the Merchants Exchange.

Mr. Thorndyke testifies that he gave the notice by telephone to Mr. Taylor, soon after receiving the information of the loss of the vessel, by long-distance telephone from Astoria; and he states that this information was given to Taylor during the afternoon of the 14th.

We do not doubt that both witnesses are testifying in absolute sincerity; and the fair inference from the admitted facts is that Thorndyke was

mistaken in his statement that he gave the information during the afternoon, and that he actually gave it during the evening; and that Taylor is mistaken in his guess that he got the information from the Merchants Exchange. The testimony on this subject was brought out some two years after the event. It is not reasonably to be expected that Mr. Thorndyke would accurately remember the exact hour or place when he conveyed this information, nor that Mr. Taylor would remember the person from whom he got the information. Thorndyke certainly received information of the loss of the vessel on the 14th; and it is a natural and fair inference that he would immediately notify the underwriter, as the most interested person. The criticism made by counsel for appellant upon Mr. Thorndyke's testimony in this respect is, we think, unfair and ungenerous. When Mr. Thorndyke was first examined as a witness, in July, he stated that immediately upon getting notice by long distance telephone, on Saturday, of the loss of the vessel, he conveyed the information to Mr. Taylor, and that he thereafter kept Mr. Taylor informed of all that transpired. In this examination, in July, the details were not called for by the questions put to Mr. Thorndyke (Apostles, p. 170).

If the statement of Mr. Thorndyke is true that he verbally notified the underwriter of the loss of the vessel, on Saturday, and abandoned to the underwriter, or, as he expressed it, told them that the vessel belonged to them, there is no question about the liability of the appellant for a constructive total loss. At that time the vessel was a derelict on the open sea and there was only a remote chance that she would ever be recovered.

Peele vs. Insurance Co., Fed. Cases No. 10905.

Appellant's attorneys raise some question as to the form of this verbal abandonment. Verbal abandonment is authorized by the California Code (Sec. 2721) and words of transfer are not essential (Sec. 2722). Notice to the insurer that the vessel has been wrecked and abandoned at sea, and belonged to the insurer (Apostles, pp. 552, 560), is a fair compliance with the statute. In this connection we call special attention to the case of

Victoria S. S. Co. vs. Western Assur. Co., 139 Pac. 807,

for the reason that this is a decision by the Supreme Court of California, construing the provisions of the *Civil Code of California* governing the right of abandonment. That was an insurance upon freight against total loss only. The vessel was stranded and

the cargo was transshipped and forwarded to destination. The expenses of transshipping and forwarding the cargo, together with the loss of the freight on the cargo that was lost in the stranding, amounted to approximately one-half of the total freight. In other words, there was a real loss of approximately one-half of the freight which had been insured. There had been an abandonment of the vessel by her owner, but there had *not* been an abandonment of the freight by the owner of the freight. On this state of facts, the underwriter contended that there could be no recovery, as the policy was free from partial loss and particular average, and there had been no abandonment as to freight. The court quoted section 2705, to the effect that a constructive total loss is one which gives to the person insured a right to abandon, and then proceeds:

> "It is not necessary under this section that there should be an actual abandonment. *It is sufficient to make a constructive total loss if the right to abandon exists.* This right to abandon exists with respect to freightage when the situation of the vessel brought about by one of the perils insured against is such that the cargo cannot be taken to its destination and the freightage be thereby earned without incurring an expense to the insured of more than half the value of the thing abandoned. With respect to this policy, the thing aban-

doned was the freight. The loss was caused by the stranding of the ship on a reef. There was an actual total loss and destruction of the ship and an actual abandonment thereof. No constructive abandonment was necessary as to the ship. Hence the freightage could be constructively abandoned notwithstanding the provision in Section 2717 that freightage cannot in any case be abandoned unless the ship is also abandoned. *The existence of the right to abandon so as to make a constructive total loss is determined by the situation at the time of the stranding.* The question is whether at that time it was reasonably possible to bring the cargo into port without an expense of more than half its value, if the insurance is upon cargo, or if it is upon freightage, without an expenditure of more than half the amount thereof." (Italics ours.)

If this is the correct construction of the *California Code,* then a technical abandonment was not necessary in the case at bar, and it was sufficient if the facts existing at the time the vessel was deserted as a derelict gave the assured a right to abandon as for constructive total loss as defined by this decision and the *California Code.*

It will also be noted that the court fixes the time for determining the right to abandon as the time of the stranding, which, by analogy in this case, would be the time when the vessel became wrecked and a derelict.

Appellant, in its brief (pp. 77-80), seeks to both discredit and distinguish this case, and refers to the decision of the Supreme Court above quoted as *dictum*. The action was to recover for a constructive total loss of freightage when there had been no abandonment as to the freightage; consequently, the question presented was, can there be a recovery for constructive total loss of freightage without abandonment? The decision of the exact question involved in the case cannot be waived aside as "*dictum*."

Nor is the attempt of appellant to distinguish that case any more successful. It is clearly stated in the case that there had been an abandonment as to the vessel; therefore, the last provision in subdivision 4 of Sec. 2717, that "freightage cannot in any case be abandoned unless the ship is also abandoned", could not have affected the decision. The ship had been abandoned, and there was therefore no obstacle to abandonment of freightage by the owner of the freightage, if he had wished to do so. Nor can it be argued that abandonment of the ship carried with it abandonment of the freightage. As stated in appellant's brief (p. 80), the freight was not owned by the owner of the vessel. It is shown by the facts in the case that the cargo, or the

bulk of it, was forwarded to destination by a substitute ship, and a net earning of approximately one-half of the freight was realized. Under this state of facts, abandonment of freight was necessary, under general law. The decision that actual abandonment is unnecessary where the right to abandon exists, is a construction of the statute as applicable to any constructive total loss, whether ship or freight.

The statute, Sec. 2705, reads: "A constructive total loss is one which gives a person insured a *right to abandon* under Sec. 2717." The Supreme Court held that this statute means what it says—that if the "right to abandon" existed, there was a constructive total loss. Actual abandonment, by notice to the insurer, is not made essential by the statute to constitute a constructive total loss. If this is a departure from the principles of marine insurance law, as recognized at common law, the statute must prevail. The decision of the Supreme Court in construing the state statute is, of course, controlling in this court.

Appellant contends, however, that the right to abandon is determined by Clause 9 of the policy, and not by the statute. It will be noted that the Supreme Court states that "the existence of the

right to abandon so as to make a constructive total loss is determined *by the situation at the time of stranding"*. In the case at bar, the existence of the right to abandon so as to make a constructive total loss must be determined by the situation at the time the vessel was wrecked and deserted at sea and floating at large as a derelict. It will scarcely be contended that actual abandonment to the insurer at that time, before the wreck was picked up by salvors, would have been ineffectual.

Peele case, Fed. Cases, No. 10905.

If the right to abandon existed at that time, then, under the *Victoria S. S. Co.* case, there was a constructive total loss.

Fulton Ins. Co. vs. Goodman, 12 Ala. 108.

Fulton Ins. Co. vs. Goodman, 32 Ala. 126.

We understand the appellant to concede a constructive total loss if the marginal clause is construed as superseding clause 9 of the policy; or if its effect is to include salvage and general average charges in the computation; or if a right to abandon at the time of desertion of the ship made actual abandonment by notice to the insurer unnecessary, under the *Victoria S. S. Co.* case as construed by us.

(2) Clause "9" Applicable Only Where Right to Abandon Is Predicated Solely Upon Physical Damage to Vessel.

We contend, further, that, in any view, clause 9 is applicable only where the right to abandon is predicated solely upon the amount of damages sustained, and has no application to the right to abandon in case of any other loss of the ship insured against. The policy insures against loss of the ship by "barratry of the mariners". If the crew deprived the owner of the possession, use and control of his ship by acts constituting barratry, the owner would have been entitled to recover under this policy a total loss, upon giving timely notice of abandonment, even though the ship itself had sustained no physical damage whatever; and it is obvious that clauses 8 and 9 would have no application whatever to that situation. The policy covers all losses and misfortunes from perils of the sea which deprive the owner of the possession and use of his vessel, save only capture and seizure, which are expressly excepted. Loss of possession or use of the vessel by embargoes, blockades and arrests, or by total submersion, or any other peril of the sea which actually deprives the owner of possession, are all perils or risks assumed by the 3rd clause of this policy.

2 *Arnould on Insurance,* Sec. 1011, (9th Edition).

Peele Case, Fed. Cases, No. 10905.

In the case at bar, the vessel was lost to the owner when she was wrecked and became a derelict. When she was brought into Astoria she was in the hands of salvors who had the sole and exclusive possession of the vessel and were asserting a claim against the vessel and cargo for about $34,000. The owner could not regain possession of his vessel at that time, except upon the condition of giving a bond for the payment of any salvage that might thereafter be awarded against the vessel and cargo. Preliminarily, the bond would have been fixed in excess of $34,000. It is true that the owner might have applied to the court and have secured the fixing of a bond in a lower sum by the appointment of appraisers to value the vessel. This would have taken time, and, in any event, the owner would have been required to assume an obligation to pay in the future whatever sum might be awarded for salvage. It was impracticable to make any accurate appraisement of the vessel and cargo at Astoria under the conditions existing at that time, so that it would have been necessary for the owner to have borne the expense and risk of taking the vessel to St. Johns and having her discharged so that the

appraisers could ascertain the amount of cargo aboard and intelligently appraise the value of the wreck.

It is our contention that, under the *California Code* and under the General Marine Insurance Law, there is a *constructive total loss whenever the owner is deprived of or loses possession of his vessel by a peril insured against, and cannot regain possession except upon terms that are onerous or such as a prudent owner would not undertake.* Clause 9 of the policy has no reference to the right to abandon for a constructive total loss in case of the loss of possession of the vessel by barratry or other peril covered irrespective of physical damage. That clause is applicable only when the abandonment is made on account of the extent of damages to the vessel. It is not applicable to any other kind of a loss. As stated above, the policy specifically covers barratry of the mariners. Now, if the crew should mutiny and take possession of the vessel, putting the master out of control, it would be a constructive total loss under this policy, although no damage whatever was done to the vessel. Clause 9 of the policy would be totally inapplicable to that situation. If the argument of appellant's counsel is correct, there can be no recovery for constructive total loss

without abandonment; and there can be no abandonment unless there is a physical damage to the vessel in excess of 75 per cent of the value stated in the policy. Under this reasoning, there could be no recovery if the vessel was lost to the owner by barratry of the crew or by seizure by pirates, or any other peril insured against not involving actual damage to the vessel itself.

If the contention of appellant is correct—and there can be no recovery for a constructive total loss of any kind unless there is a physical damage to the vessel, adjusted as provided in clauses 8 and 9—then these clauses are in direct conflict with clause 3; and all losses by barratry of the mariners, embargoes, arrests, seizure by pirates, total submersion of the ship, etc., not involving actual physical damage to the ship itself, are excluded from the policy.

This is, manifestly, an erroneous construction. Clause 9 of the policy must be limited so as to be applicable only where the abandonment is made on account of the extent of the damage sustained by the vessel of which a partial average adjustment could be made, and is not applicable to an abandonment on account of loss of possession, use and control of the vessel by one of the perils insured against not involving physical damage.

In the case of

Cossman vs. West, 6 Asp. 233 (N. S.),

the distinction between the nature of the possession of a derelict by salvors, and that of salvors in other cases where the vessel had not become a derelict, is clearly pointed out. The court says:

> "In the case of salvors, there is a distinction between a derelict and a vessel which, though in great danger, has not been abandoned by the master and crew. *In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel,* and no one can interfere with them except in the case of manifest incompetence. But, in an ordinary case of disaster, when the master remains in command, he retains the possession of the ship and it is his province to determine the amount of assistance that is necessary, etc.
> * * *
>
> "In the present case, *the vessel, being a derelict, the salvors had the exclusive possession and control of it up to the time of the sale, and were not bound to give it up until they had been remunerated for the salvage services. Assuming that their possession is a constructive total loss* but not an absolute total loss and that there was still a chance that the vessel might be redeemed and restored, the sale under the decree of the court removed all speculation on that subject and entitled the plaintiff to treat the case as one of total loss without abandonment." (Italics ours.)

There had been no abandonment in that case,

and it will be noted that the court assumed that the exclusive possession of a derelict by salvors constitutes a constructive total loss, and that if a sale by a decree of the court for salvage follows, the loss becomes actual total loss without any abandonment having been given.

Applying the doctrine of that case to the present case, we insist that when, by perils insured against, the vessel was reasonably and properly abandoned by the crew and became a derelict and was afterwards picked up and brought into Astoria by the salvors and was in their exclusive possession and control, the owner and master being excluded from any participation therein, the salvors asserting a salvage claim in excess of her value, there was a constructive total loss of the vessel at that time irrespective of the extent of damage she had sustained; and that, inasmuch as the owner gave notice of abandonment at that time, the underwriter is liable under this policy.

Constructive total loss may exist in the following situations resulting from sea disasters, as stated by Storey in the Peele case:

Fed. Cases, No. 10905.

> "(a) Where there is a forcible dispossession or ouster of the owner of the ship, as by capture, etc.;

"(b) Where there is a restraint or detention which deprives the owner of the free use of his ship, as in cases of embargoes, blockades and arrests;

"(c) Where there is a present total loss of the physical possession and use of the ship, as in cases of submersion;

"(d) Where there is a total loss of the ship for the voyage, as in cases of shipwreck, so that the ship cannot be repaired in the port where the disaster happens;

"(e) Where the injury is so extensive, that by reason of it the ship is useless, and the making repairs would exceed her value."

2 *Arn. on Ins.,* sec. 1099 (9th Edition).

Capture gives right of abandonment, because it deprives the owner of the possession of his ship, even though the vessel may be recaptured and restored, uninjured and unencumbered, the day after notice of abandonment (in America) or after action brought (in England).

2 *Arn.* 1099 (9th Edition).

Rhinelander vs. Insurance Co., 4 Cranch. 29.

In England, conditions justifying abandonment must exist both when notice is given and when action brought.

Arnould, sec. 1100 *et seq.*

In America, if conditions warrant abandonment

when notice given, subsequent events do not change the effect of the abandonment.

If, when abandonment is tendered, the possession and present use of the vessel has been lost to the owner by a peril insured against, but the vessel is in existence and where the owner can in time and on onerous conditions regain possession, does this fact deprive him of the right to abandon?

The rule established by the cases as given by *Arnould,* sec. 1105, is

> "that the ship must be *in esse* in the country of the owner under such circumstances that he may, if he pleases, take possession of her, and may reasonably be expected to do so."

See, also,

Greene vs. Ins. Co., 9 Allen 217.

Snow vs. Ins. Co., 119 Mass. 592.

In *McIver vs. Henderson,* cited in 2 *Arn.,* sec. 1105, the vessel was captured by the French, who, after taking her guns, stores, etc., gave her in charge to a Portuguese captain, and put the original English captain and part of his crew on board. The Portuguese captain took her to port and claimed her by gift of the French captors. The English captain resisted this claim and obtained a decree in his favor subject to appeal, deposited 427 pounds,

the proceeds of the cargo, to abide the appeal, secured the release of his ship, and returned with her to England. The vessel was then worth 1,300 pounds, having originally been worth 3,000. The expense of bringing the vessel to England was 221 pounds. The underwriters claimed this was a restitution of the vessel, inasmuch as the vessel was *in esse* and where the owners could immediately take possession, and the vessel had a present value of 1,300 pounds. The owner claimed that he could not retake possession without assuming a liability for the final result of the possible appeal in the prize case, which might exceed the present value of the ship. The court held:

> "The mere restitution of the hull of the ship, if the assured may eventually have to pay more for it than it is worth, is not a circumstance by which the totality of the loss is reducible to an average one. * * * It appears to us that there existed at the time of the abandonment, at the time of action brought, and that there exists at the present moment, circumstances fully sufficient to entitle the plaintiff to recover as for a total loss."

It will be noted that the damage in that case was not sufficient to warrant abandonment for the amount of the damage alone under the English law; and that the right to abandon rested solely upon the fact that the owner had been deprived of the pos-

session and use of his vessel by a peril insured against, and could not regain immediate possession without assuming liability for the ultimate decision in the prize case on appeal, if an appeal should be taken, and that that liability might eventually exceed the value of the ship. In other words, that case decides that if the owner is once deprived of possession of the ship by a peril insured against, then, in order to defeat his claim for a constructive total loss, before abandonment, in America, or before action brought, in England, the vessel must be restored to him, or be placed where he can regain possession at once without assuming a liability which may eventually exceed the then value of the ship, in its damaged condition, under the English rule, or may eventually exceed fifty per cent of its then value, under the American rule.

Whether this deprivation of possession is by forcible capture by an enemy, by barratry or mutiny, or by desertion of the ship by the crew in case of derelict, is immaterial, so long as the cause is a peril insured against.

In *Thorneley vs. Hebson,* 2 B. & Ald. 513, the vessel became damaged by stress of weather and her crew deserted to another ship, but at the same time put eight men from this other ship on board and in

charge of the deserted vessel as salvors, and they ultimately brought her into port, before action was commenced, when her damage was found to be less than sufficient to constitute a constructive total loss. The court held the loss not total, first, because the owner had never really lost possession of the vessel, as the eight men placed on board and who brought her into port were in fact his agents; and, second, the owners, under the circumstances, ought to have taken charge of the vessel after she reached port, the salvage amounting to only two-thirds of the price she sold for.

In *Cossman vs. West,* 6 Asp. Mar. cases (N. S.) *supra,* the vessel was deserted at sea by the master and crew, owing to sea damage she had sustained, and became a derelict; and was afterwards picked up by salvors and taken into a safe port, where, after proceedings in court of which the owner had notice, she was sold to pay the salvage. The owner never tendered abandonment, but after the sale claimed against his underwriter for an actual or absolute total loss, and this claim was upheld by the court. The court distinguished the case from that of *Thorneley vs. Hebson, supra,* upon the ground that, in the Thorneley case, the owner never lost possession, as the possession of the salvors, put aboard

by the master, was a joint possession of the owner and salvors, whereas, in the case of a derelict picked up by salvors, as in the *Cossman case,* the possession of the salvors was sole and exclusive, and the owner could not regain possession for any purpose without giving bond or in some other appropriate manner assuming or giving security for such salvage as might eventually be allowed. In that case the salvage, as subsequently determined, did in fact exceed the amount for which the vessel sold. The court held that when the ship became a derelict, by a peril insured against, the owner lost possession, and a constructive total loss then existed; and that the owner could not reasonably be required or expected to regain possession after the vessel was taken into a safe port by the salvors, when, in order to secure possession, he would have had to give bond for the salvage, which might, when ultimately fixed, exceed the value of the vessel in her then condition.

The reasoning of the court in that case fairly implies that, if abandonment had been tendered (and action begun as required under the English rule) while the salvors were in exclusive possession of the vessel, it would have made a constructive total loss although the salvage award may have subsequently been fixed at a sum less than the value of the vessel.

The principle applied in the above cases is approved in

Green vs. Ins. Co., 9 Allen (Mass.) 217.

Snow vs. Ins. Co., 119 Mass. 592.

In this last named case, the vessel was insured for a whaling voyage. After reaching the North, the vessel was caught in the ice, damaged and threatened with total destruction. The master and crew deserted the vessel, and, upon their return to San Francisco, the owner gave notice of abandonment. In fact, the vessel had been picked up by salvors, and, at the time of the abandonment, she was safe in the hands of the salvors on her way to San Francisco, where she arrived in safety shortly after her owners had given notice of abandonment. The court held that the leaving of the vessel in the ice, made necessary by a peril insured against, was a constructive total loss and warranted an abandonment at any time before she was rescued—that her subsequent rescue by salvors, her master not having been able to resume possession of her, did not change the total loss to a partial one, but that there was still a constructive total loss of the vessel at the time of abandonment. This was a voyage policy, and, therefore, involved a loss of the voyage rather than a loss of the ship, and is, therefore, not entirely in

point; but it recognizes the principle of the English cases cited above.

In the case at bar, the vessel was damaged by perils insured against, was justifiably deserted by the crew and became a technical derelict; she was subsequently picked up by salvors, and brought into Astoria, and libelled by them for $34,000. The salvors brought her into Astoria, on Sunday, October 15, 1911. Mr. Thorndyke testifies that he heard by long-distance telephone on Saturday, the 14th October, of the loss of the vessel, and notified the agent of the underwriter of the loss and intention to abandon, and followed that on Monday, the 16th, by formal written abandonment. Mr. Taylor, the agent, denies that he received any notice from Thorndyke on Saturday, but admits receipt of the formal written abandonment on Monday. If the notice of intention to abandon was given by Thorndyke on Saturday, while the vessel was still a floating derelict, it is apparently conceded that the abandonment was justified. We have discussed elsewhere this conflict in the evidence between Thorndyke and Taylor. For the present, we will assume that the abandonment was on Monday, and apply the established principles of law to the conditions existing at that time.

(a) And, first, it is clear that the *owner had lost the possession and use of his vessel by perils of the sea.*

(b) The vessel was not in a port of repair. It is proven and is not disputed, that the vessel could not be discharged of her cargo, dry-docked, surveyed nor repaired at Astoria.

(c) The vessel in her then condition, as she lay at Astoria, had no value as a ship, and was entirely innavigable, being worth only her break-up or wreckage value—which was not to exceed $2,000.

Walker's Tes., Apostles, p. 194.

Thorndyke, Apostles, pp. 181-2.

This evidence is not contradicted by the defendant, and must therefore be accepted as an established fact.

The stipulation of a value of $5,000 (Apostles, p. 386), was made some five months later, after the vessel had been taken to St. Johns, discharged of her cargo, and fully surveyed. When the expenses incurred in taking the vessel to St. Johns and discharging her cargo, as shown in the statement of Johnson & Higgins, are deducted from the estimated value of $5,000 at St. Johns, it clearly appears that the statements of Walker and Thorndyke as to her

value when lying at Astoria were correct. This, too, eliminates the risk involved in towing the vessel from Astoria to St. Johns.

(d) The salvors were in exclusive possession, and asserting a claim of $34,000 against vessel and cargo. The vessel owner could not regain the possession and use of his vessel without making claim and executing bond to secure the whole amount of this salvage claim. As the cargo could not be discharged at Astoria, the vessel owner would have had to assume the liability for not only the vessel's proportion of the salvage, but for the proportion of the cargo as well, although he had no real interest in the cargo, the voyage having been broken up.

Having lost possession of his vessel by a peril covered by his policy, can it be said, under the authorities above cited, that the owner, on October 16th, 1911, under the circumstances just stated, "could, if he pleased, have taken possession of her, and could *reasonably be expected to do so?*" No reasonable man could be expected to assume a liability for an indefinite salvage award (claimed by the salvors to be $34,000) to be fixed by the court at some future date, covering both vessel and cargo, in order to regain possession of a wrecked vessel, lying in a place where he could neither discharge,

survey nor repair, knowing the vessel to be practically worthless, and confronted with the certainty of expenses in getting to a port of repair in excess of her then value, and with the high probability that the cost of repairs alone, after reaching a port where repairs could be made, would be in excess of the repaired value of the vessel, even if she proved to be capable of being repaired at all.

The owner could not delay decision as to abandonment until the salvage claim was adjusted, nor even until the vessel reached a port where discharge and repairs were possible. He was required to decide promptly whether he would abandon and claim a total loss, or retain his right to the vessel and claim partial indemnity under other provisions of the policy. He cannot speculate by awaiting events, but must decide upon his election at once.

Under these circumstances, we respectfully insist that the abandonment was justified, even though the cost of repairs, as subsequently ascertained after reaching a port where the repairs could be made, should prove to be or should then be fairly estimated to be somewhat less than is specified in clause 9. The abandonment was justified upon the ground that the owner had lost possession of his vessel by a peril insured against, and could not regain possession at

that time without assuming liabilities which he could not reasonably be expected to assume.

(3.) "High Probability" Rule.

When this vessel was wrecked and deserted, the owner was required to make prompt decision, after learning the fact, if the right of abandonment was claimed. The vessel being at Astoria in a wrecked condition, filled with water and in the hands of the salvors, the owner was required to immediately decide whether he would abandon to the insurer or waive his right to abandon. Delay would have amounted to a waiver. In the nature of things, he was required to act upon *probabilities* rather than certainties.

In the case of

Peele vs. Ins. Co., Fed. Cases, No. 10905,

Mr. Justice Story stated the American rule to be that the abandonment depends

> "upon the facts and the judgment upon those facts at the time when it is made. It cannot remain in suspense nor be divested by subsequent events."

The rule is stated by *Kent* (3 Kent Com. 321) as follows:

> "The right of abandonment does not depend upon the certainty but on the high probability of a total loss either of the property or

> of the voyage or both. The insured is to act, not upon certainties but upon probabilities; and, if the facts present a case of extreme hazard and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense."

This rule is expressly approved by the U. S. Supreme Court in

Bradley vs. Md. Ins. Co., 12 Peters 378, 397.

and in

Orient Ins. Co. vs. Adams, 123 U. S. 67, 75.

The rule is also approved by the Circuit Court of Appeals of the 7th Circuit, in

Royal Exchange Assur. vs. Graham etc. Co., 166 Fed. 32.

If this rule is applied to the situation of the vessel at the time notice of abandonment was given on October 16, 1911, there can be no question that the abandonment was justified.

It was contended by appellant in the lower court that the rule of "high probability" does not apply under this policy because of the wording of clause 9. The language of this clause is:

> "The insured shall not have the right to abandon the vessel unless the amount which this company would be liable to pay under an adjustment as of a partial loss for labor and materials (exclusive of salvage or general average ex-

penses and the cost of funds) shall exceed half the amount hereby insured."

The argument was that the rightfulness of the abandonment must be determined under this policy, not by fair judgment upon the facts at the time when abandonment was tendered, but upon the actuality of the extent of the damage as subsequently ascertained.

This contention leaves out of view entirely one of the elements entering into the question of the right to abandon, that is, the risk involved in getting the vessel to a port of repairs. But it is manifest that the amount which the insurer "would be liable to pay" under an adjustment for partial loss could be determined on October 16th, when the abandonment was made, only by estimating the probabilities as to the costs.

The case of *Hall vs. Ins. Co.,* 9 Pick. 466, supports the contention of appellee. It will be noted, however, that the Massachusetts Court does not place its ruling altogether on the conditions in the policy, but questions this condition as confirmatory of what it claims to be the general rule of law.

We think that the case of *Orient Ins. Co. vs. Adams, supra,* is decisive of this question. The policy in that case contained these conditions—that

there should be

> "no abandonment as for a total loss on account of the said vessel grounding, or being otherwise detained, or in consequence of any loss or damage, *unless the injury sustained be equivalent to 50 per centum of the agreed value in the policy.*"

And also, that:

> "In no case whatever shall the assured have the right to abandon until it *shall be ascertained* that the recovery and repairs of said vessel are impracticable."

In other words, the policy required two things to warrant abandonment—a loss or damage equivalent to fifty per cent of the policy value and the ascertainment that the recovery and repair of the vessel was impracticable. The contention of the insurer in that case was

> "that while the rule laid down by the (trial) court made the *probability of a stipulated loss* at the time of abandonment the test of the right to abandon, the policy made the *actual existence of the stipulated proportion of loss* the ground of the exercise of that right."

This is also an accurate statement of the contention of the appellant in the court below upon the conditions in the present policy. The Supreme Court approved the instructions of the trial court, saying with respect to the *quantum* of loss or injury:

> "While the damage must at the time have

> been equivalent to 50 per cent of the agreed value, and while the fact that the repairs subsequently made amounted to only $6,000 tended to show that the actual damage was not so great as claimed, that fact is not decisive of the right to abandon."

The court reaffirmed the "high probability" doctrine as laid down by Kent, and in *Bradley vs. Ins. Co.,* and held that doctrine applicable under the policy conditions above quoted.

It is manifest that the clause in the policy in that case, that no abandonment shall be made "in consequence of any loss or damage *unless the injury sustained* be equivalent to 50% of the agreed value," does not materially differ from the clause in the present policy so far as concerns the question now under discussion.

In the case of *Royal Exch. Assur. vs. Graham, etc., supra,* the policy provided that the right of abandonment "shall not exist *unless the loss exceeds one-half the value* of hull and machinery as stated in the policy."

Notwithstanding this policy provision that the right of abandonment should not exist unless the *loss exceeded* the percentum mentioned, the Court of Appeals applied the "high probability" rule in testing the justification of the abandonment. The

reasoning of the court, in making the application of this rule under the policy provision there involved, seems to us to be unanswerable. The owner is required to exercise the right of abandonment promptly; otherwise he waives it. From the very nature of these disasters to ships when lying in out-of-the-way places, with no opportunity to discharge cargo, put the vessel in dry dock or make a survey, certainty as to the cost of repairs or the expenses of taking the ship to a port of repairs cannot be had at the time the owner is required to decide whether he will abandon or not; and, therefore, certainty of results cannot be the test of the exercise of the right. And it, therefore, follows that the test is the *high probability that the cost will exceed the stipulated amount.*

V.

IS THERE A CONSTRUCTIVE TOTAL LOSS COMPUTED STRICTLY ACCORDING TO CLAUSES 8 AND 9 OF THE POLICY?

First. Mr. Wilfred Page has made a sample adjustment of this loss on behalf of the defendant, by which he arrives at the result that the liability of the defendant, adjusted as for a partial loss, is $9,540.66 (Page's Tes., Apostles p. 478).

We are submitting, at the end of this brief, a statement of an adjustment of this loss, which shows a liability of the defendant upon an adjustment as for a partial loss, under clauses 8 and 9 of the policy, of a fraction over $17,000. Any liability of the defendant in excess of $15,000, under an adjustment as for a partial loss, constitutes a constructive total loss under clause 9.

In our statement, we have not differed with Mr. Page as to principles upon which the adjustment is to be stated; but we do differ as to the items to be taken into the computation.

The total of the items subject to the deduction of one-third new for old, as found by Mr. Page, amounts to $18,913.65 (Apostles p. 477).

To this total we have added the following item, not considered by Mr. Page, viz.:

I. Hall Bros. bid for repairs called for by Walker's supplemental report. This bid totals $5,245; but item 6 thereof was misunderstood by the bidders, and, when explained to them by Capt. Gibbs subsequently, they corrected their bid on that item from $755 to $277.50. The $277.50 is included in Page's computation, and therefore the entire $755 should be deducted from Hall's bid. Item 9 in Hall's bid is $575 for resalting the vessel. Subsequently Gibbs and Walker agreed upon $600 as the cost of resalting, and, as that item of $600 is included in Page's computation, the $575, item 9, should also be deducted from Hall Bros. bid. Gibbs and Walker also agreed to a further deduction of $80 from Hall's bid on account of certain painting, and also certain other reductions totaling $655.00 contained in Gibbs and Walker agreement dated March 27, 1912. (Tr. p. 470.) These deductions, amounting to $2,065, taken from Hall's bid of $5,245, leaves $3,180 to be added to Page's total of $19,568.65, subject to the usual one-third off new for old.

II. There should also be added the cost of supervising the repairs. Cornfoot's bid of $20,950, which has been taken by Page as the measure of the cost of repairs, was upon the condition that he should have sixty-five days to complete the repairs.

The only witness who has testified as to the cost of supervision is Walker, who stated that an expert would cost $25 per day, but that a competent non-expert would cost from $10 to $15 per day. We assume that the owner, if he did not employ an expert, would at least employ a first-class, competent non-expert to supervise so important a piece of work as this was, and we have therefore entered this item at $975, being sixty-five days at $15 per day. These two items, $3,180 and $975, added to Mr. Page's total of $19,568.65, makes a total for the "one-third off new for old" column of $23,723.65

Deducting one-third new for old, 7,907.88

Leaves for net column, $15,815.77

1. To this net column Mr. Page adds $201.89 as the vessel's proportion of bottom painting (Page's Tes., Apostles p. 477).

   (We accept his distribution as to this item.)

2. He also adds $1,500 for consumable stores lost, they not being subject to the deduction of new for old. He takes the $1,500 from Cornfoot's testimony that he estimated the stores at this sum in making up his bid.

   We agree with Mr. Page that the item of stores is not subject to the "new for old" deduction; but we contend that actual cost of

these stores is a more reliable basis for allowance than the loose estimate of Mr. Cornfoot. We will discuss the reasons for our contention later. Mr. Thorndyke, the general manager of the plaintiff company, purchased the stores aboard the ship which were lost, and he states that the actual cost was $2,370.14. We have therefore added this sum to the net column, instead of the $1,500 added by Mr. Page.

3. We have also added the expenses incurred on account of ship and cargo in removing the ship from Astoria to St. Johns, removing the cargo, and disentangling her from her complications. We will discuss the propriety of this item later.

These expenses, as adjusted by Johnson & Higgins, aggregate $8,780; but this includes the salvage award of $3,000, and, as salvage is excluded by clause 9 of the policy from this computation, we have deducted that amount from the total of $8,780, leaving $5,780 to be added to the net column under this head. Mr. Page omitted these items altogether on the theory that they are "general average" charges, and therefore excluded by clause 9. We will endeavor later on to show that they are not, technically, general average charges, although

the cargo was liable for its proportion of them.

4. We have also added an item of $1,554.78, being expenses incurred on behalf of the ship alone, as found by Johnson & Higgins. We do not understand why Mr. Page ignored these particular average expenses, as they are unquestionably chargeable in an adjustment as for partial loss. An itemized statement making up this $1,554.78, as taken from Johnson & Higgins' statement of adjustment, is attached to our detailed statement.

These four items, $201.89, $2,370.14, $5,780 and $1,554.78, added to the previously ascertained net column above of $15,849.10, makes a net total of $25,755.01, and the underwriter's 30/45 thereof is $17,170.61.

Whether there was a constructive total loss, computed strictly under clause 9 of the policy, depends therefore upon whether the items we have added, as shown above, should be taken into the computation. We will discuss them in the order stated.

A. The first item added by us is that of $3,885 to the "one-third off new for old" column, being the bid of Hall Bros. for the repairs called for by

Walker's supplemental report, after making proper deductions.

This is altogether a question of fact. The owner was entitled to such repairs as would restore his vessel to as good condition as it was in before the damage occurred.

Mr. Walker, who acted as expert marine surveyor for the owner, and whose competency is admitted (See Gibbs' Tes. Apostles pp. 413-4), testified that the repairs called for by this supplemental report and covered by Hall Bros.' bid, were made necessary by the disaster, and that she could not be put in as good seaworthy condition as she was in prior to the accident without making these repairs (Walker's Tes. Apostles pp. 350-1, pp. 357-8).

This testimony is not directly contradicted by any other witness. It appears from the record that on March 27, 1912, Capt. Gibbs, the marine surveyor of defendant, went over both the original and supplemental surveys and specifications with Mr. Walker, and accepted some of the items in the supplemental report but declined to agree to the necessity of the items making up this $3,885.

At that time, however, Capt. Gibbs had not surveyed nor even seen the vessel (Gibbs' Tes. Apostles p. 430).

Afterwards, on May 2d and 3d, Gibbs did examine the vessel. In his testimony he does not state that the repairs called for by this supplemental report were not necessary to restore the ship to her previous condition. The most that can be claimed from his testimony is that his refusal to agree to these particular items in the supplemental report is, impliedly, an expression of opinion that these damages were either not caused by the sea disaster, or the repairs were unnecessary to restore the vessel. This refusal by Gibbs to agree to these repairs, however, was not under the sanction of an oath. If Gibbs in fact believed that these repairs were unnecessary, it would have been an easy matter for defendant to have his statement to that effect on the witness stand under oath. It appears that both Gibbs and Page went to Portland with Walker about May 2nd for the ostensible purpose of examining the vessel in order to determine whether the underwriter would agree to these repairs, and that they had Walker's supplemental report with them (Gibbs' Tes. Apostles pp. 430-1-2).

Under these circumstances, the failure of both Gibbs and Page to state under oath that these repairs were not necessary, or not occasioned by sea peril, is most significant.

We insist, therefore, that Walker's statement that these repairs were rendered necessary by the disaster and were essential to restore the vessel to a good seaworthy condition, stands absolutely uncontradicted, and establishes that fact in the case.

If these repairs were necessary as a result of the disaster suffered by the vessel, it follows as a matter of course that the estimated cost thereof should be computed in determining whether there was a constructive total loss.

It will be noted that Mr. Walker insisted upon these repairs at the time he and Capt. Crow, who was acting for the underwriter at that time, made their original survey and specifications; but Capt. Crow refused to agree to them or sign a survey report containing them; consequently Mr. Walker signed the joint report containing the specifications agreed to by Capt. Crow—which is Plff's Ex. I—and later made to the owner this further and supplemental report, which is Plff's Ex. J. (Walker's Tes. Apostles pp. 357-8, pp. 188-9, 350-1.)

Mr. Walker has consistently contended that the repairs called for by this supplemental report, and upon which Hall Bros. submitted their bid, were absolutely necessary to restore the ship to her former condition.

The modification of certain items of these supplemental specifications by the stipulation on pp. 348-9, cited by appellant's attorneys, does not materially affect these estimates. Mr. Walker had explained that the duplications in his supplemental report of work covered by the original specifications amounted to only a small per cent thereof (Walker's Tes. Apostles p. 222).

This partial duplication was the subject of the agreement, and did not exceed five per cent (Apostles pp. 229-230).

B. The next item added by us to Mr. Page's total in the "one-third off new for old" column is the sum of $975 for expenses of supervision of the repairs. It is computed at $15 per day for sixty-five days, the time called for in the Cornfoot bid.

It is customary for owners to provide a competent man to supervise ship repairs being made under contract; and the wages of such supervisor is computed as a part of the labor expense in adjustment as for partial loss.

> "A fair allowance for superintendence and for the custody of the vessel, if necesary, while the repairs are going on, should be made, which allowance is to be charged to the account of labor, from which one-third is to be deducted; but wages and provisions of officers and crew, while the ship is undergoing repairs, are not

to be computed as part of the particular average."

Hall vs. Ocean Ins. Co., 21 Pick. 472, 482.

"As the repairing of a vessel at a port other than her home port involves the ship-owner in certain expenses for the superintendence of repairs, these are allowed by the underwriters when the cost of the repairs is such as to constitute a claim under the policy."

Gow, Mar. Ins., p. 219.

Portland was not the home port of this vessel, and the cost of superintendence is therefore allowable as a part of the labor expense.

C. The next item in dispute is that of stores lost or destroyed. Mr. Page allows $1,500, which was Cornfoot's estimate for this item in making up his bid; we claim $2,370.14, which was the actual cost, as shown by Thorndyke.

D. The next item added by us to Mr. Page's "net column" total is the sum of $5,780, being the expenses incurred after abandonment to the underwriter in taking the vessel from Astoria to St. Johns, discharging the cargo, disentangling the complications so as to regain possession of the vessel and put her in a position where repairs could be made. We do not understand there is any dispute as to the fact of these expenditures. Both Mr. Clise and Mr. Thorndyke testified to the expenditures, and

they were approved by Johnson & Higgins, the adjusters, and the appellant accepted the items in the adjustment and paid a proportion thereof.

The total of these expenses for the joint rescue of vessel and cargo, as shown by Johnson & Higgins' adjustment, aggregate $8,780. The 9th clause of the policy excludes from the computation to determine a constructive total loss "salvage or general average expenses and cost of funds."

The services rendered by the salvors of this vessel were strictly salvage services rendered prior to abandonment and the $3,000 allowed by the court to the salvors and included in this total of $8,780 we treat as a salvage expense under clause 9 of the policy. We have therefore excluded that item from the computation.

The remainder, $5,780, is treated by the defendant as "general average expenses," within clause 9, and consequently to be excluded from the computation. We do not consider these as general average expenses, under clause 9 of the policy.

The fault in appellant's position lies in the assumption that expenses incurred by the shipowner after abandonment and after the vessel reaches a port of refuge which is not a port of re-

pair are strictly general average expenses, because the vessel owner, upon incurring such expenses for the common benefit of vessel and cargo, has a right to recover the cargo's proportion thereof from the cargo owner.

There are two questions involved, first, are these expenses technically general average expenses, within the meaning of clause 9 of the policy; and, second, if not, then is the vessel-owner entitled to take into the computation the whole of such expenses, or should the proportion thereof collectible by the vessel-owner from the cargo be excluded? That such expenses are not strictly general average expenses within the meaning of the so-called "Boston" clause, or clause 9 of this policy, is well settled by the authorities.

Seward vs. U. S. Ins. Co., 11 Pick. 90.

Greeley vs. Ins. Co., 9 Cush. (Mass.) 415.

Wallace vs. Ins. Co., 22 Fed. 67.

Royal, etc., Assur. vs. Graham, etc., 166 Fed. 32.

Ellicott vs. Ins. Co., 14 Gray (Mass.) 318.

Young vs. Ins. Co., 24 Fed. 282.

These expenses were incurred after abandonment to the underwriter, but were such as, at the time abandonment was made, were foreseen and con-

templated, and necessary, if the vessel was to be repaired or the cargo saved.

Harvey vs. Ins. Co., 79 N. W. 900.

Gilchrist vs. Ins. Co., 104 Fed. 566.

Mason vs. Ins. Co., 110 Fed. 455.

Insurance Co. vs. Stark, 6 Cranch. 268.

It is also settled by the decided weight of American authority that the owner is entitled, on a partial loss, to recover the whole expense from his underwriter, in the first instance, and leave the underwriter to recover the proper proportion from the cargo owner; and the same rule applies in determining whether the amount of the loss is sufficient to constitute a constructive total loss.

Muggorth vs. Church, 1 Caine's Rep. (N. Y.) 215.

Pezant vs. Ins. Co., 15 Wend. 453.

Potter vs. Ins. Co., Fed. Case No. 11335.

Watson vs. Ins. Co., 7 Johns. R. 57.

P. & S. S. Co. vs. P. Ins. Co., 89 N. Y. 559.

Int. N. Co. vs. Ins. Co., 100 Fed. 304.

2 Phillips, Mar. Ins., Sec. 1545.

2 Arnould Mar. Ins., Sec. 1125.

Cal. Civil Code, Sec. 2745.

These expenses were incurred in order to get the vessel to a port where it was possible to repair

her; to get the cargo discharged, as repair was otherwise impossible; and to get actual possession and control of the vessel, which was necessary preliminary to any repair. All of these expenses, except only the cost of discharging the cargo, would have been necessary in order to place the vessel in a position for being repaired, if she had had no cargo aboard.

They were, as stated in the *Sewall case,* in the nature of, but not technically, general average; the adjustment was simply an apportionment between vessel and cargo, as the cargo had been incidentally benefited. As pointed out in the *Wallace case,* such expenses are, in a sense, in the nature of, although not technically, "sue and labor" expenses, as the entire property would have been utterly lost to both parties if they had not been incurred.

The payment by the insurer of a part thereof was a payment of part of the expenses incurred in taking care of his own property, as the vessel belonged to him after proper abandonment. As the ship could not be repaired and restored to the owner without these expenses being incurred, they must be computed in determining constructive loss.

E. The next and last item added by us to Mr. Page's net column total is $1,554.14, being expenses

incurred by the owner in these rescue operations which were incurred for the benefit of the vessel alone. They are a part of the expenses necessarily incurred in putting the ship in a place where repairs were possible and in taking care of her during that time. The principle under which we claim this item is sufficiently covered by our previous discussion under head D. If the expenses incurred for the joint benefit of vessel and cargo are chargeable, certainly the expenses incurred on account of the vessel alone should be.

If the principles contended for by us are sustained, then the statement we have submitted shows a liability of the underwriter, on adjustment as for a partial loss, of $17,170, which is some $2,000 in excess of the amount necessary to constitute a constructive total loss.

We will not enter into a detailed discussion of the various items making up the $5,780 and $1,554 rescue expenses. They were all allowed by Johnson & Higgins; and the items making up the $5,780 were accepted by both this appellant and the cargo owners. So long as negotiations are pending between the owner and underwriter in good faith for a determination of the nature and extent of the loss and practicability and advisability of

repairing the vessel, the expenses incident to preserving the property from further loss and caring for it, are admissible expenses.

Hall vs. Ins. Co., 21 Pick. 472.

Any other rule would result in useless waste and loss to the property in which both are interested.

SECOND. In the discussion thus far of the question of constructive total loss strictly under clause 9, we have treated the Cornfoot bid of $20,950 as the measure of the cost of the repairs covered by the original Walker-Crowe specifications. We deny, however, that we are bound by that bid.

The repairs were never actually made; and the bids submitted by the four bidders were merely their respective estimates of what the cost would be. The question, in the last analysis, is, what was the "high probability" of the actual cost, based upon the condition of facts existing when the abandonment was tendered?

(a) The first fact to be considered was the risk incident to towing the vessel, in her then condition, from Astoria to St. Johns. If she had stranded on any of the river bars, she would probably have broken up, in her weakened state at that time. She did strand coming down the river, and, in our opin-

ion, it is absurd to contend that this movement of the vessel involved no risk. Captain Gibbs, defendant's expert, says there was no real risk involved in this towage (Gibbs' Tes. Apostles pp. 401-2). Walker says it did involve a real risk (Walker's Tes. Apostles p. 229).

The established and undisputed fact, as shown by Clise's testimony (Apostles pp. 341-2), is that the salvors considered that the towing involved a material risk, and they refused to consent to it; the United States marshal would not assume the risk; and the court at Portland would not order or sanction the operation except upon the condition that the salvors be fully indemnified by bond against the risk. At that time, the appellant apparently considered that a risk was involved, because it refused to join the appellee in giving this indemnity bond.

(b) In exercising judgment upon the facts existing at the time of the abandonment, consideration must be given to the value of the vessel as compared with the costs incident to placing her in a place and condition where repairs would be possible. Walker and Thorndyke testify that the vessel, on October 16th, had no value as a vessel except her break-up value. This is not contradicted by any other witness. After the vessel was moved to St. Johns,

discharged, and surveyed, she was considered by the parties to have a value of approximately $5,000, as shown by Tr. p. 349. In the statement by the average adjusters, her contributive value was placed at $8,500. The expenses of placing her in that position, as hereinbefore stated, amounted to $5,780, plus $1,554, in addition to the salvage award of $3,000.

(c) The other fact to be considered, in determining whether to abandon or not, was the question of the cost of repairs. Even if the vessel had been subsequently repaired, so that the actual cost was definitely settled, that would not be decisive of the rightfulness of the abandonment. This is expressly so held in *Orient Ins. Co. vs. Adams, supra,* and in *Royal Ex. Assur. case,* 166 Fed., *supra*... Not having been repaired, the cost of repairs must be estimated. As stated before, there were four bids on the original specifications, exclusive of the repairs called for by the supplemental report as follows:

Oregon Dry Dock Co.	$25,200.00
Vulcan Iron Works	$24,600.00
St. Johns Shipbuilding Co.	$23,070.75
Albina Eng. & Mch. Works, Cornfoot	$20,950.00

Cornfoot also modified his bid by offering to

reduce the time from sixty-five to fifty-five days for an additional $1,000.

Is there any reason to assume that the Cornfoot bid more correctly measures what the cost of repairs would have been than does the bid of the Oregon Dry Dock Company? It is not a question of what somebody will do the work for. If some one had offered to do the work for less than cost, in order to aid the underwriter in escaping liability for a total loss, surely such a bid would not be the proper measure of cost. If the damage to the vessel was such that an accurate estimate of the actual cost of the repairs would equal the sum necessary to constitute a total loss, neither the subsequent payment of a part of such costs by the underwriter, nor a subsequent mistaken estimate of what the repairs would cost, will reduce a total to a partial loss. (*2 Arnould, Marine Ins.,* Sec. 1126, 9th Ed.)

These various bids are all competent evidence as bearing upon the question of the probable cost of repairs; but the question remains one of fact, to be determined by all of the evidence.

When all of these circumstances are considered, and the rightfulness of the abandonment tested by them, as of the date the abandonment was made, we

think there can be no reasonable doubt that the appellee was entitled to abandon under the strict terms of clause 9. The appellee was required to abandon or waive its right to abandon on October 16th. Bids for repairs could not be obtained at that time, because of the condition of the vessel and her situation in Astoria, where she could not be discharged nor surveyed. In exercising its judgment at that time upon the facts as they then existed, the appellee could not foresee that the supplies aboard—for illustration—which had cost, two weeks before, some $2,300 or $2,400, could be replaced for $1,500 through careless estimates or over-anxiety to secure the work on the part of some contractor.

If these various bids are to be considered as the opinions of the several bidders as to what it would cost to make these repairs, then, assuming them to be equally honest and competent, the composite of all of the estimates is a fair basis for judgment upon the question of the probable cost. Where the owner has already abandoned, he should not be concluded by the subsequent bid of one man, when three others, equally competent, place a much higher estimate upon the cost. A bidder may be influenced to make a bid below actual cost in

order to provide work for his plant, and be willing to take a loss on the work rather than suffer a greater by permitting his plant to stand idle and his employees to seek employment elsewhere; he may also be influenced by a desire to aid underwriters in escaping a claim for total loss in order to secure their favor and patronage in other work later. In a case where the owner, as agent for both parties, in letting a contract for particular work, he is required to accept the best responsible bid offered, because he is not injured by an underestimate by the bidder, and his agency for the insurer requires him to secure the best results for his principal so long as the interests of the agent are not prejudiced. But where abandonment has been tendered and rejected, and the insurer and owner are antagonistic, and the owner is contending that the abandonment was justified when made, a different situation exists and different principles apply, and offers to make the repairs submitted by different contractors are merely their several estimates of the cost.

Appellant further contends that there is no evidence in the record by which the segregation of the costs under any of these other bids can be made, so as to make deductions in accordance with

clauses 8 and 9 of the policy; and the decision in *Soelberg vs. Ins. Co.,* 119 Fed. 23, is cited as controlling.

Keeping in mind that the abandonment is to be determined by the facts existing at the time it was made, and that therefore absolute certainty as to the result is not possible and is not required, we think the classification or segregation of the Cornfoot bid in the evidence can be taken as a reasonably safe guide in considering the other bids, and a fair and reasonable result obtained by applying to the different items in the Cornfoot bid, as segregated by him, the percentage of increase of the other bids over the Cornfoot bid. Mathematical accuracy is not required.

VI.

It is contended by appellant that, in event of decree going against it, it is entitled to a credit for the amount paid on the Johnson & Higgings statement. We think not. If the owner rightfully abandoned in October, 1911, he was then entitled to $30,000, and the wreck belonged to the underwriter. The expenses subsequently incurred, in endeavoring to save something from the wreck, were incurred for the benefit of the underwriter as the then owner of the wreck. It is entitled to the wreck, or its

proceeds, but is not entitled to the thing saved and also re-imbursement of the expenses incurred in saving it. The owner is not required to bear the expense of saving a further loss, after he had properly abandoned.

Appellant's criticisms upon the opinion of the court below are, we think, hypercritical. The court used the general expression "one-third off new for old," as expressing, in a short way, the deductions contemplated by the policy. This expression is frequently, we might say almost uniformly, used by courts and text books as a manner of stating the deductions to be made in partial average adjustments. It is not literally accurate, whether considered with reference to this policy or to the general rule under English forms of policies. There is never any deduction from stores, anchors, new sails, and unused equipment carried as reserve, *et cetera;* but the expression "one-third off" is generally used to express the deductions to be made under the policy, whatever they are. But we do not deem it necessary to closely analyze the forms of expression used by the trial court nor to consider whether each detached sentence can be justified under the authorities. If there was a total loss, either actual or constructive, the judgment must be affirmed.

VII.

It was contended by appellant in the lower court that recovery for actual total loss could not be had under the pleadings in this case. The libel (paragraph XII) alleges that the voyage was broken up, "and said schooner and her outfits, * * * * were totally lost by the perils of the sea and perils insured against," etc. The prayer is for judgment for $30,000 damages "on account of the loss of said schooner," etc.

This is sufficient to authorize a recovery for either actual or constructive total loss.

Snow vs. Ins. Co., 119 Mass. 592.

We have endeavored to discuss the several questions involved in this case—those discussed by appellant and others essentially involved—but without any attempt to follow the order of appellant in its brief. Speaking broadly, we have this case: A vessel worth $30,000, and valued in the policy at $45,000, was insured for $30,000 against actual or constructive total loss; she was wrecked by sea perils, deserted and became a derelict, picked up by salvors and held under a claim for salvage in excess of even her repaired value. After the disaster, and when abandoned by the owner to the under-

writer, she had little, if any, value; and, after reaching a port of repair and discharging cargo, and incurring expenses of several thousand dollars, her value was, at the most, only $5,000. The underwriter claims that there was neither an actual nor a constructive total loss. The mere statement of the case shows that the position of the appellant is contrary to all principles of marine insurance. If a damage to a vessel by a peril insured against reduces the value of that vessel from $30,000 to $20,000, or even to $5,000, does not make a case of constructive total loss, under the terms of this policy, then the pretense that it afforded the owner protection against a constructive total loss of his vessel, so prominentaly stated on the margin of the policy, is a delusion and a snare, and the exaction of a premium for protection which the policy did not give, was a fraud.

Respectfully submitted,

H. R. CLISE,
CLISE & POE,
BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Appellees.

ILLUSTRATIVE STATEMENT REFERRED TO IN FOREGOING BRIEF.

Items to be computed under clause 9 of policy, in determining constructive total loss, referred to in foregoing brief of appellees:

1.	Items subject to deduction of one-third "new for old:"	
	(a) Items in Cornfoot's bid, admitted by Page (Tr. p. 475)	$18,563.00
	(b) Salting vessel, admitted by Page, Gibs & Walker	600.00
	(c) Caulking stanchions, agreed upon by Gibbs & Walker, and admitted by Page (R. p. 470)	277.50
	(d) Dockage dues chargeable to vessel, conceded by Page (R. p. 473)	128.15
	(e) Additional repairs necessary to fully restore ship, shown by Supplemental Survey Report by Walker—Hall Bros.' bid after deducting items 3, 6 & 9), covered by Gibbs & Walker agreement, and their supplemental agreement	3,180
	(f) Supervision during 65 days of repair at $15 per day	975.00
		$23,723.65
	Deduct one-third "new for old"	7,907.88
	Forward	$15,815.77

2. (a) Add expenses charged by Johnson & Higgins to general average on vessel and cargo, $8,780, less the salvage award, $3,000.....$ 5,780.00

(NOTE.—These expenses, although termed general average for convenience, are not strictly general average, within the meaning of that term in clause 9 of policy, and are all chargeable as expenses incident or necessary to repair and restore vessel.)

Wallace vs. Ins. Co., 22 Fed. 66, 70.

Seward vs. U. S. Ins. Co., 11 Pick. 90.

The American rule is that the whole of such expenses is to be computed in determining validity of abandonment, although a per cent. thereof is recoverable from cargo owner.

Pegent vs. Ins. Co., 15 Wend. 453.

Muggorth vs. Church, 1 Caine's R., 215.

Potter vs. Prov. Ins. Co., Fed. Cases, No. 11335.

Watson vs. Ins. Co., 7 Johns. R. 57.

P. & S. S. Co. vs. P. Ins. Co., 89 N. Y. 563.

Int. U. Co. vs. Ins. Co., 100 Fed. 304.

2 Phillips, Mar. Ins., Sec. 1545.

(b) Items of expenditures found by Johnson & Higgins, but charged to owner as being particular average, or on account of vessel alone

(itemized statement attached)..... $ 1,554.78

Forward..... $23,150.55

(c) Stores on board and lost:
Invoice cost 2,370.14

(Cornfoot testified he estimated subsistence stores, chandlery stores, galley stores and slop-chest at $1,500, and Page concedes these items. Thorndyke testified from actual invoices that these stores cost as follows:

Subsistence stores	$1070.39
Chandlery stores	629.07
Galley stores	313.98
Slop-chest	356.70
	$2370.14)

Total loss, on adjustment as for partial loss, under clause 9..... $25,520.69

Owner pays 15/45..... 8,506.89

Underwriter pays 30/45..... $17,013.80

This exceeds fifty per cent of amount insured, and therefore makes a case of constructive total loss under clause 9 of the policy.

"EXHIBIT A."

Items of expenditures allowed by Johnson & Higgins, but charged to owner as being particular average, or on account of vessel alone, to-wit:

(The references are to testimony of J. A. Bishop, Adjuster, and General Average Adjustment, Respondent's Ex. "4.")

Paid Frank Walker, for surveying vessel (proportion charged to vessel)....$	600.00
(Apostles p. 533; Resp. Ex. "4," p. 11.)	
Paid Port of Portland.....	45.10
(Resp. Ex. "4," p. 17.)	
Berthing ship January 19 to February 8 (Vessel abandoned voyage Feb. 15)	40.00
(Apostles pp. 534-5; Resp. Ex. "4," p. 19.)	
Paid Vulcan Iron Works for repairs to Donkey Boiler.....	28.70
(Resp. Ex. "4," p. 19.)	
Expenses of H. R. Clise for trip to San Francisco on request of adjusters for conference relative to adjustment, Nov. 18th	38.00
(Apostles p. 510; Resp. Ex. "4," p. 25.)	
Thorndyke expenses trip to San Francisco on same conference.....	107.00
(Apostles p. 511; Resp. Ex. "4," p. 29.)	

Thorndyke, expenses to Portland to look after survey of vessel..... 23.60

(Apostles p. 511; Resp. Ex. "4," p. 31.)

Thorndyke, expenses to Portland to receive tenders 34.20

(Apostles p. 512; Resp. Ex. "4," p. 31.)

Master's expenses as agent in looking after vessel subsequent to separation of vessel and cargo on Feb. 15th, as follows:

Moving and drying sails..... 25.20
(Resp. Ex. "4," p. 35.)

Fares to confer with Walker, Surveyor 11.20

(Resp. Ex. "4," p. 35.)

Hauling ship 1.60
(Resp. Ex. "4," p. 35.)

Moving sails for examination of vessel.. 9.60
(Resp. Ex. "4," p. 37.)

Board of Master, Feb. 7 to April 12.... 58.00

(Apostles p. 515; Resp. Ex. "4," p. 37.)

Expenses of Master, trip from St. Johns to Portland..... 3.00
(Apostles p. 531; Resp. Ex. "4," p. 37.)

Expenses of Master on trip from St. Johns to Seattle 6.85

(Resp. Ex. "4," p. 37.)

Expenses of Master on trip from Seattle to Portland and return, May 3..	14.70
(Apostles p. 531; Resp. Ex. "4," p. 37.)	
Master's wages from Feb. 15 to April 12, at $125 per month.....	250.00
(Apostles pp. 515-531; (Resp. Ex. "4," p. 36.)	
Paid telegrams and telephones.....	29.34
(Apostles p. 516; Resp. Ex. "4," p. 39.)	
Paid Port of Portland wharfage, Feb. 15 to May 31st.....	212.00
(Apostles p. 534; Resp. Ex. "4," p. 39.)	
Paid for telegrams.....	10.96
(Apostles p. 518; Resp. Ex. "4," p. 41.)	
Total.....	$1,554.78